FILE COPY

FILED

NOV 21 1935

No. 540

In the Supreme Court of the United States

OCTOBER TERM, 1935

THEODORE STITT, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	4
Conclusion	9
Appendix	11

CITATIONS

Cases:

Callaghan v. *Reconstruction Finance Corporation, No. 539, Oct. Term, 1935* — 2, 4, 8

Realty Corp. v. *O'Connor*, 295 U. S. 295 — 6, 8, 9

Statutes:

National Bankruptcy Act as amended:

Sec. 40 (11 U. S. C. (1934 ed.), sec. 68 — 11

Sec. 72 (11 U. S. C. (1934 ed.), sec. 112) — 11

Sec. 77B (11 U. S. C. (1934 ed.), sec. 207) — 12, 14

Act of June 7, 1934, c. 424, sec. 3, 48 Stat. 923 (11 U. S. C. (1934 ed.), sec. 76a) — 14

In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 540

THEODORE STITT, PETITIONER

v.

RECONSTRUCTION FINANCE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RECONSTRUCTION FINANCE CORPORATION IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 377–385) is not reported. The opinion of the Circuit Court of Appeals (R. 416–423) is reported in 79 F. (2d) 187.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered August 1, 1935 (R. 423). A petition for rehearing was denied and the order entered on September 18, 1935 (R. 434). The petition for a

writ of certiorari was filed October 24, 1935. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1935.

QUESTION PRESENTED

Whether a referee in bankruptcy, in a bankruptcy proceeding that has been superseded by a Section 77B reorganization proceeding, is entitled to compensation by virtue of the provisions of Section 40 (a) of the Bankruptcy Act that allow referrees "one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition", in addition to the fees and commissions otherwise provided for in Section 40 (a).

STATUTES INVOLVED

The applicable statutes are set forth in the Appendix (*infra*, pp. 11–14).

STATEMENT

Review has been sought for another phase of the decision below (R. 415) by petition for a writ of certiorari in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, now pending before this Court.[1] The facts are set forth by respondent in its brief in opposition to that petition. Only the following additional facts need here be stated.

Allied Owners Corporation was referred to petitioner as a referee in bankruptcy on August 8, 1933

[1] The same record is used by petitioners in both cases.

(R. 141), until June 22, 1934, when the bankruptcy proceeding was superseded by a Section 77B reorganization proceeding (R. 3). His report, filed on March 2, 1935 (R. 287), included, without recommendation, his own application for an allowance of $25,000 as referee in bankruptcy (R. 288). The memorandum filed by the District Judge on March 8, 1935, without further hearing, included the allowance to petitioner (R. 305–306), as did also the orders of March 11, 1935, which respondent sought to vacate (R. 319–331). The District Court overruled respondent's objections (R. 377), and on May 13, 1935, entered an order accordingly (R. 386).

On appeal by respondent from these orders the Circuit Court of Appeals ruled, on July 22, 1935, that (R. 422)—

> The award of $25,000 to the referee was clearly erroneous. * * * Under Section 40 (a) of that act referee was only entitled to "a fee of fifteen dollars * * * in each case * * * and twenty-five cents for every proof of claim filed for allowance * * * and from estates which have been administered before them one per centum commission on all moneys disbursed to creditors by the trustee * * *."

Under this ruling, petitioner would be entitled to a total compensation of $1,038 (R. 270).

ARGUMENT

1. Petitioner does not appear to suggest the basis upon which his compensation should be computed. He quotes Section 77B (i) (Br., pp. 7–8) and states that "To deny the referee part commissions for the services * * * would seem to make a nullity of this section." But he goes on to say that under this section "allowance certainly should not be greater than that authorized under Section 40", and, further, that "the court could allow less than the compensation provided in Section 40 provided the amount authorized by that section should be considered more than equitable or reasonable." This theory seems in complete accord with the ruling of the court below (R. 422). Petitioner, therefore, relies only on a construction of Section 40 and does not assert that Section 77B [2] provides the maximum compensation to be allowed to him as a referee in bankruptcy.

Section 40 (a) provides:

> Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost

[2] That Section 77B (i) does not disturb existing restrictions on compensation has been shown by respondent in its brief in opposition in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, now pending before this Court.

> of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition.

Petitioner urges that the "composition" referred to in this section includes proceedings under Section 77B. The cases cited by petitioner do not consider this question and we submit that the plain language of Section 40 (a) refutes his contentions. The portion of Section 40 (a) stressed by petitioner provides compensation for referees when composition under Section 12, made available in bankruptcy proceedings as the well recognized alternative to liquidation, comes into operation. Section 77B, on the other hand, is a more recent enactment that sets up proceedings totally unrelated to Section 12 and independent of all "prior" bankruptcy proceedings (Section 77B (k)), and has its own provisions for compensation (Section 77B (c)). Furthermore, since there are no referees in Section 77B proceedings, Section 40 (a) hardly could be applicable. Therefore, petitioner, to support his contentions, must argue that Congress enlarged by mere implication the customary meaning of Section 40 (a) and applied it to an independent proceeding in which it could never be used. The argument seems its own refutation. Indeed, Congress has

expressly declared in Section 72 of the Bankruptcy Act, that:

> Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation for his services than that expressly authorized and prescribed in this act.

A situation, substantially similar to the one here presented, was recently before this Court, in *Realty Corp.* v. *O'Connor,* 295 U. S. 295. A referee in proceedings under Section 12 referred to General Order XLVIII, which prescribes the compensation for referees in composition under Section 74. The Court stressed the independence from one another of the bankruptcy proceedings and the Section 74 proceedings, stating (p. 301):

> Section 74 (11 U. S. C. § 202) and the rules applicable thereto have relation to proceedings for the relief of a *debtor not a bankrupt* who seeks a composition or an extension of his debts. The present proceeding under § 12 of the act (11 U. S. C. § 30) is for a composition by a *bankrupt*. The general order was passed in the exercise of the rule-making power, and was directed to *proceedings of a particular class.* The jurisdiction that we now exercise is part of the judicial function, and is directed to *proceedings of a different class.* The one does not control the other. *Meek* v. *Centre County*

Banking Co., 268 U. S. 426, 434; *West Co.* v. *Lea*, 174 U. S. 599. (Italics supplied.)

Petitioner refers to Section 40 (c), which provides:

> In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

The plain language of this section entitles the referee merely to a legitimate portion of allowances proper under Section 40 (; it does not provide compensation not included within Section 40 (a).

It is not clear to respondent what petitioner means by stating that "resort to Section 77B was in the same bankruptcy proceeding as originally instituted" (Br., pp. 9–10). Subdivision (k) of that section provides that—

> None of the sections enumerated in this subdivision [including Section 40] shall apply to proceedings instituted under this section [77B] unless and until an order has been entered directing the trustee or trustees to liquidate the estate.

The debtor corporation is now under Section 77B and since no liquidation order has been entered Section 40 cannot apply. Therefore, petitioner is in the anomalous position of relying solely on Section 40, and at the same time arguing for a continuity of proceedings, which, by the terms of subdivision (k), excludes the application of Section 40.

Section 77B makes provision for costs of administration in proceedings thereunder. To calculate petitioner's maximum allowance for prior proceedings in a manner that assumes that the estate has been fully administered may well result, as in the District Court below, in an additional burden upon the insolvent estate. The brief in opposition in *Callaghan* v. *Reconstruction Finance Corporation*, No. 539, discusses (pp. 5–6) the universally recognized intent of Congress to reduce these costs, in the enactment of Section 72 and again of Section 77B.

Petitioner is a referee in bankruptcy and, as said in *Realty Corp.* v. *O'Connor, supra*, 299:

> Referees in bankruptcy are public officers (11 U. S. C. §§ 61, 64), and officers of a court. Like public officers generally, they must show clear warrant of law before compensation will be owing to them for the performance of their public duties. *United States* v. *Garlinger*, 169 U. S. 316, 321; *People ex rel. Rand* v. *Craig*, 231 N. Y. 216, 221.

We submit that he has not done so.

Petitioner states that the decision below places the compensation of referees "at the mercy of bankrupts, creditors, or stockholders" (Br., p. 11). The petitioner magnifies the effect that the compensation of referees has on the course of a debtor's estate through bankruptcy or 77B reorganization. Further, we submit that the decision below does not leave the compensation of referees at the mercy of others. For the time that an estate is in bank-

ruptcy the referee is entitled, as was pointed out by the court below, to certain fees (in this case aggregating $1,038) and to 1% on all moneys disbursed to creditors.[3] If 77B proceedings supersede the bankruptcy proceedings, the referee may well be appointed a Special Master, as was done in this case. If the 77B proceedings were ill-advised and an order for liquidation is entered pursuant to subdivision (k), referees may again be appointed and Section 40 becomes operative.

2. The issues in this case arise out of the construction of Section 40 of the Bankruptcy Act in its application to Section 77B, and they can arise again only when Section 77B proceedings are preceded by bankruptcy proceedings. When the present transitional period is passed, it is believed that only isolated reorganization proceedings will be preceded by bankruptcy proceedings.

CONCLUSION

The decision of the court below is correct, and is in accord with the principles announced by this Court in *Realty Corp.* v. *O'Connor, supra.* There is no conflict of decisions. The question presented is not one of general or continuing importance.

---

[3] Therefore, the court below did not, as suggested by petitioner (Br., p. 9) misinterpret the issue. Instead, it stated correctly the maximum compensation of referees in bankruptcy proceedings that are superseded by Section 77B reorganization proceedings.

It is therefore respectfully submitted that the petition should be denied.

STANLEY REED,
Solicitor General,
MAX O'RELL TRUITT,
Solicitor,
Reconstruction Finance Corporation.

Of Counsel:

JAMES B. ALLEY,
General Counsel, Reconstruction Finance Corporation.
ELI WHITNEY DEBEVOISE.

NOVEMBER 1935.

APPENDIX

NATIONAL BANKRUPTCY ACT AS AMENDED

SEC. 40 [11 U. S. C. (1934 ed.), Sec. 68] (a) Referees shall receive as full compensation for their services, payable after they are rendered, a fee of $15 deposited with the clerk at the time the petition is filed in each case, except when a fee is not required from a voluntary bankrupt, and 25 cents for every proof of claim filed for allowance, to be paid from the estate, if any, as a part of the cost of administration, and from estates which have been administered before them 1 per centum commissions on all moneys disbursed to creditors by the trustee, or one-half of 1 per centum on the amount to be paid to creditors upon the confirmation of a composition.

(b) Whenever a case is transferred from one referee to another the judge shall determine the proportion in which the fee and commissions therefor shall be divided between the referees.

(c) In the event of the reference of a case being revoked before it is concluded, and when the case is specially referred, the judge shall determine what part of the fee and commissions shall be paid to the referee.

SEC. 72. [11 U. S. C. (1934 ed.), Sec. 112] Neither the referee, receiver, marshal, nor trustee shall in any form or guise receive, nor shall the court allow him, any other or further compensation

for his services than that expressly authorized and prescribed in this title.

SECTION 77B.—

(i) [11 U. S. C. (1934 ed.), Sec. 207 (i)] If a receiver or trustee of all or any part of the property of a corporation has been appointed by a Federal, State, or Territorial court, whether before or after June 7, 1934, at 12 o'clock noon a petition or answer may be filed under this section at any time thereafter by the corporation, or its creditors, as provided in subdivision (a) of this section, and if such petition or answer is approved, the trustee or trustees appointed under this section, or the debtor if no trustee is appointed, shall be entitled forthwith to possession of and vested with title to such property, and the judge shall make such orders as he may deem equitable for the protection of obligations incurred by the receiver or prior trustee and for the payment of such reasonable administrative expenses and allowances in the prior proceeding as may be fixed by the court appointing said receiver or prior trustee. If a receiver or trustee has been appointed by a Federal or State or Territorial court prior to the institution of a proceeding under this section, and such proceeding shall be dismissed under subdivision (c), clause (8), of this section, the judge may include in the order of dismissal appropriate orders directing the trustee or trustees, or the debtor if no trustee is appointed, to transfer possession of the debtor's property within the territorial jurisdiction of such court to the receiver or prior trustee so appointed, upon such terms as the judge may deem equitable for the protection of obligations incurred by any trustee or trustees appointed under

this section, and for the payment of administrative expenses and allowances in the proceeding hereunder. For the purposes of this section the words "Federal court" shall include the district courts of the United States and of the Territories and possessions to which this section and section 206 of this title are or may hereafter be applicable, the Supreme Court of the District of Columbia, and the United States Court of Alaska, and the District Court of the United States for the Territory of Hawaii.

(k) [11 U. S. C. (1934 ed.), Sec. 207 (k)] If an order is entered directing the trustee or trustees to liquidate the estate pursuant to the provisions of clause (8) of subdivision (c) of this section: (1) The case may be referred to a referee as provided in section 45 of this title, who shall be compensated as provided in section 68 of this title; (2) the first meeting of creditors shall be held as provided in section 91 of this title, upon notice as provided in section 94 of this title; (3) a trustee or trustees shall be appointed as provided in section 72 of this title, and be compensated as provided in section 76 of this title; (4) claims which are provable under section 103 of this title may be proved as provided in section 93 of this title, except that the time within which proof may be made shall not expire until six months after the date of the last publication of the notice of the first meeting; (5) debts shall be entitled to priority as provided in section 104 of this title; (6) sales shall be made as provided in subdivision (b) of section 110 of this title; (7) dividends may be declared and paid as provided in section 105 of this title. None of the sections enumerated in this subdivision (k), except subdivi-

sions (g), (i), (j), and (m) of section 93 of this title, and subdivisions (a) and (e) of section 110 of this title, shall apply to proceedings instituted under this section unless and until an order has been entered directing the trustee or trustees to liquidate the estate. All other provisions of this title, except such as are inconsistent with the provisions of this section, shall apply to proceedings institute under this section, whether or not an order to liquidate the estate has been entered. For the purposes of such application, provisions relating to "bankrupts" shall be deemed to relate also to "debtors"; "bankruptcy proceedings" or "proceedings in bankruptcy" shall be deemed to include proceedings under this section; the date of the order approving the petition or answer under this section shall be taken to be the date of adjudication, and such order shall have the same consequences and effect as an order of adjudication.

SECTION 3 OF THE ACT OF JUNE 7, 1934, C. 424, 48 STAT. 923 (11 U. S. C. (1934 ED.), SEC. 76A)—

* * * The compensation allowed a receiver or trustee or an attorney for a receiver or trustee shall in no case be excessive or exorbitant, and the court in fixing such compensation shall have in mind the conservation and preservation of the estate of the bankrupt and the interests of the creditors therein.

U. S. GOVERNMENT PRINTING OFFICE: 1938.